IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

H.B. MAXEY, Jr.
(a.k.a. "Bud" Maxey)

vs. **Civil Action No. 1:93cv122-D-D**

ROBERT A. SMITH,
Individually and as
Alderman/Vice Mayor, City of Starkville,
EMMETT SMITHERMAN, JR., Individually
and as Alderman, City of Starkville,
ED BUCKNER, Individually and as Alderman,
City of Starkville,
HAROLD E. WILLIAMS, Individually and as Alderman,
City of Starkville,
MELVIN RHODES, Individually and as Alderman,
City of Starkville and
BEN HILBUN, JR., Individually and as City Attorney for the
City of Starkville, and the
CITY OF STARKVILLE

MEMORANDUM OPINION

Again this court takes up the matter of former Starkville Police Chief H. B. Maxey and the decision of the Starkville Board of Aldermen to place him on administrative leave. The basic facts underlying this action have already been discussed by this court as well as the Fifth Circuit, and the undersigned sees no reason to repeat all of them here. See, e.g., Maxey v. Smith, 823 F. Supp. 1321 (N.D. Miss. 1993). The parties have submitted more evidentiary proof in conjunction with their present submissions to the court, but any additional facts which warrant discussion shall be provided by the court as they are required.

In essence, the plaintiff claims that he was placed on administrative leave from his position of Police Chief in retaliation for the exercise of his rights under the First Amendment to the United States Constitution. He primarily brings this action under the Civil Rights Act of 1965, 42 U.S.C. § 1983. The present motion before the court is the defendants' second Motion for Summary Judgment.

DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

II. QUALIFIED IMMUNITY

This court previously denied the defendants' Motion for Partial Summary Judgment, and their assertion of entitlement at that time to the protection of qualified immunity. Maxey v. Smith, Civil Action No. 1:93cv122-D-D (N.D. Miss. Sept. 23, 1994) (Memorandum Opinion and Order Denying Defendants' Motion for Partial Summary Judgment). The defendants appealed that order to the Fifth Circuit, which determined that genuine issues of material fact precluded a definitive determination on that issue. Maxey v. Smith, No. 94-60794, slip op. at 12 (5th Cir. Jun. 21, 1995). However, the Fifth Circuit did note that "[n]either the district court's ruling nor this one precludes the Starkville defendants from submitting another motion for summary judgment based upon additional facts or from trying the issue of qualified immunity on the merits before a jury." Maxey v. Smith, No. 94-

60794, slip op. at 13 n.6 (5th Cir. Jun. 21, 1995). The defendants accepted this invitation from the Fifth Circuit to file an additional Motion for Summary Judgment based upon immunity, and this court now considers the matter once again.

In the motion presently before the court, the defendants charge that there is no genuine issue of material fact as to whether the plaintiff's statements to the press were a "substantial" or "motivating" factor behind the decision of the defendants to place him on administrative leave. Since the plaintiff cannot establish this fact, they continue, the defendants are entitled to qualified immunity. While certainly relevant to the core issue of the merits of the plaintiff's First Amendment claim, the undersigned fails to see how this particular argument has any bearing on the question of immunity.

This court does believe, however, that it understands the source of this confusion. In its unpublished opinion, the Fifth Circuit found that genuine issues of material fact existed as to the "basis of the Board's decision," and appears to have found this issue material to the determination of qualified immunity. Maxey v. Smith, No. 94-60794, slip op. at 12 (5th Cir. Jun. 21, 1995). The Fifth Circuit went on to dismiss the defendants' appeal on qualified immunity because of relevant disputed factual issues. Baulch v. Johns, 70 F.3d 813, 815 (5th Cir. 1995) ("[A] district court's denial of a qualified immunity summary judgment is not appealable when there are disputed issues concerning the immunity claim.") (citing Johnson v. Jones, --- U.S. ---, 115 S.Ct. 2151, 2159, 132 L.Ed.2d 238 (1995)).

The determination of qualified immunity is a three-pronged inquiry. The court must determine:

1) if the plaintiff has asserted the violation of a constitutional right at all;
2) if the law was clearly established at the time of the official's action; and
3) the objective reasonableness of the official's conduct as measured by reference to clearly established law.

Brown v. Bryant County, 67 F.3d 1174, 1181 (5th Cir. 1995). Disputed issues of material fact relevant to qualified immunity which would preclude the grant of summary judgment are those centering around the "objective reasonableness" of the defendant's alleged actions - the final inquiry

of the qualified immunity analysis. See, e.g., Mangieri v. Clifton, 29 F.3d 1012, 1016 (5th Cir. 1994); Lampkin v. City of Nacogdoches, 7 F.3d 430, 435 (5th Cir. 1993) ("Rule 56 still has vitality in qualified immunity cases if [there are] underlying historical facts in dispute that are material to resolutions of the questions **whether the defendants acted in an objectively reasonable manner in view of the existing law and facts available to them.**") (emphasis added); Auster Oil & Gas, Inc. v. Stream, 835 F.2d 597, 601 (5th Cir. 1988) ("Had appellants timely asserted the question of qualified immunity, subsidiary questions of fact might have arisen, such as what information they possessed that might have led a reasonable person to believe that [their action] was lawful."). It is possible that the merits of a case are so inexorably intertwined with the inquiry of "objective reasonableness" that they cannot be separated.[1] However, in cases like the one at bar, as in most cases, questions of fact as to the actual merits of the plaintiff's claims are altogether different questions from those of immunity. See Bonitz v. Fair, 804 F.2d 164, 174 (1st Cir. 1986) ("[The defendant's] claim that he did not in fact cause the alleged wrong is not an argument that he is entitled to immunity, but rather is an argument that he is not liable."); Roos v. Smith, 837 F. Supp. 803, 806 (S.D. Miss. 1993) ("Patently, defendants' argument goes directly to the merits of the plaintiff's allegations in this case."). To routinely equate the immunity question to the question of the merits would make the court's determination of immunity on summary judgment no different than a determination of the merits on summary judgment. This is wholly impractical considering that a determination of immunity is to be made at the earliest possible stage, even before discovery is conducted. Hunter v. Bryant, 502 U.S. 224, ---, 112 S.Ct. 534, 537, 116 l.Ed.2d 589 (1991) ("Immunity ordinarily should be decided long before trial."); Anderson v. Creighton, 483 U.S. 635, 639, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987) (stating whenever qualified immunity is asserted as

[1] For example, this would most likely occur in a claim of false arrest, where another reasonableness inquiry as to "probable cause" dictates the merits of a claim. But see Mangieri, 29 F.3d at 1016-18 (finding officer entitled to qualified immunity on false arrest claim when parties generally agreed to facts underlying suit).

affirmative defense resolution of issue should occur at earliest possible stage); Babb v. Dorman, 33 F.3d 472, 477 (5th Cir. 1994) (stating that issues of qualified immunity are determined from face of pleadings without extended resort to pre-trial discovery).

The subjective beliefs of the Starkville officials as to what facts they actually relied upon in taking their actions are irrelevant to the objective reasonableness of those alleged actions. Mangieri, 29 F.3d at 1017. Rather, the issue is an "objective (albeit fact-specific) question whether a reasonable officer could have believed" that he was violating the plaintiff's constitutionally protected rights "under the circumstances of the **complained of** action." Mangieri, 29 F.3d at 1017 (emphasis added) (quoting Pfannstiel v. City of Marion, 918 F.2d 1178, 1183 (5th Cir. 1990)); see Hale v. Townley, 45 F.3d 914, 918 (5th Cir. 1995) ("Factual allegations are examined to determine whether they would be sufficient, if proven, to establish a violation of clearly established law."). In its most basic terms, this court must 1) assume that the official committed the acts of which the plaintiff complains, 2) determine what relevant facts and circumstances surrounded the action, including what facts the official was aware of or should have been aware of when taking the alleged action, and 3) objectively determine as a matter of law whether a reasonable official in the defendants' position would have believed that he was violating clearly established constitutional rights by taking such action. Only the second of these inquiries has the potential to raise genuine issues of material fact, and only the presence of such issues would allow the submission of the immunity question to the finder of fact. Brown v. Bryan County, 67 F.3d 1174, 1181 n.14 (5th Cir. 1995); Mangieri, 29 F.3d at 1017-18; Lampkin, 7 F.3d at 434-36.

Even if the issue of the defendants' true motivation for placing the plaintiff on administrative leave affected the qualified immunity analysis, the defendants have failed to demonstrate the absence of a genuine issue of material fact on the matter. When determining a qualified immunity issue on a motion for summary judgment, the court must still believe the evidence of the nonmovant and draw all justifiable inferences in his favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (stating that in ruling on motion for summary judgment, court is not

to make credibility determinations, weigh evidence, or draw from facts legitimate inferences for movant). Even more particularly, "the determination of objective reasonableness must be based on a version of the facts most favorable to the plaintiff." Lampkin, 7 F.3d at 435. Even in light of the new evidentiary submissions by the defendants in this case, this court cannot say that the defendants are entitled to a judgment as a matter of law. The motion of the defendants for the entry of summary judgment shall be denied as to their claims of qualified immunity.[2]

III. THE PLAINTIFF'S § 1983 CLAIMS AGAINST DEFENDANT HILBUN

The defendants do address the issue of whether the plaintiff is actually entitled to recovery on the merits as against the defendant Ben Hilbun. The suit against Hilbun in his official capacity is in effect a suit against the City of Starkville. Kentucky v. Graham, 473 U.S. 159, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). A municipality such as Starkville may be held liable only if it is "alleged to have caused a constitutional tort through 'a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers.'" C-1 by P-1 v. City of Horn Lake, 775 F.Supp. 940, 948 (N.D. Miss. 1990) (quoting Praprotnik v. City of St. Louis, 485 U.S. 112, 121, 108 S.Ct. 915, 922, 99 L.Ed.2d 107, 116 (1988)).[3] What constitutes "custom or policy" is well established in the Fifth Circuit. Brown, 53 F.3d at 1419; Johnson v. Moore, 958 F.2d 92, 94 (5th Cir. 1992).

The plaintiff has failed to demonstrate any evidence to the court that the City of Starkville had any "custom or policy" which was followed by Hilbun in this case and which would make him

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[2] The court notes that even if the defendants had moved for summary judgment on the merits of the plaintiff's claims against the defendant aldermen, the result would be no different. The inquiry would still be whether there existed a genuine issue of material fact as to the motivation of the board in making its decision, and whether the defendants were entitled to a judgment as a matter of law.

[3] However, the single act of a policymaker can constitute the "policy" of a county. Pembaur v. City of Cincinnati, 475 U.S. 469, 480, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986); Huddleston, 787 F.Supp. at 112. As the defendants concede, the defendant aldermen constitute "official policymakers" for the City of Starkville in the case at bar, and their individual actions can create § 1983 liability for the city. Mr. Hilbun, however, is the City Attorney. The plaintiff does not argue, nor does this court believe, that Mr. Hilbun constitutes an "official policymaker" for the City of Starkville.

officially liable to the plaintiff, either directly under § 1983 or as a conspirator to violate the plaintiff's civil rights. There is no genuine issue of material fact as to this matter and the defendants are entitled to a judgment as a matter of law on this claim.

IV. THE PLAINTIFF'S CONSPIRACY CLAIMS

A. CONSPIRACY UNDER § 1985

The defendants also seek summary judgment on the conspiracy claims of the plaintiff arising under 42 U.S.C. § 1985. They correctly point out to the court that a claim under § 1985 is one based upon violation of the right to equal protection of the law. In order to maintain such an action the plaintiff must first be able to establish "that some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action." Bray v. Alexandria Clinic, 506 U.S. ---, 122 L.Ed.2d 34, 45, 113 S.Ct. 753 (1993) (citing Griffin v. Breckenridge, 403 U.S. 88, 102, 29 L.Ed.2d 338, 91 S.Ct. 1790 (1971)); Hagan v. Houston Indep. Sch. Dist., 51 F.3d 48, 53 (5th Cir. 1995); Burns-Toole v. Byrne, 11 F.3d 1270, 1276 (5th Cir. 1994). The United States Supreme Court has not specifically addressed the scope of the phrase "or perhaps otherwise class-based," but has intimated that gender-based discrimination is sufficient in addition to race-based claims. Bray, 122 L.Ed.2d at 46.

In the case at bar, the plaintiff has failed to demonstrate any type of class-based animus which would suffice to support an action for conspiracy under § 1985(3). There exists no genuine issue of material fact as to this claim, and the defendants are entitled to a judgment as a matter of law. The plaintiff's claims in this regard shall be dismissed.

B. CONSPIRACY UNDER § 1983

It is well established that while plaintiffs may bring conspiracy claims for violation of § 1983, the conspiracy itself is not actionable. Pfannstiel v. City of Marion, 918 F.2d 1178, 1186 (5th Cir. 1990); Brown v. City of Galveston, 870 F. Supp. 155, 160 (S.D. Tex. 1994).

> Of course, for a claim under § 1983, a conspiracy as such is not an indispensable element as it is under § 1985. But it may be charged as the legal mechanism through which to impose liability on each and all of the Defendants without regard to the person doing the particular act.

Pfannstiel, 918 F.2d 1178, 1187 (5th Cir. 1990) (quoting Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963)). In order to prevail, the plaintiff must show:

1) the existence of a conspiracy that involves state action; and
2) the deprivation of civil rights in furtherance of a conspiracy by a party to the conspiracy.

Pfannstiel, 918 F.2d at 1187; Brown, 870 F. Supp. at 160. Such a conspiracy is often used to hold non-state actors liable under § 1983 if they have conspired with state actors. Cinel v. Connick, 15 F.3d 1338, 1343 (5th Cir. 1994) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 1606, 26 L.Ed.2d 142 (1970)). Before addressing whether a conspiracy in fact exists, at least as to those defendants sued in their individual capacity, the court must first determine whether those individual defendants are entitled to qualified immunity. Hale v. Townley, 45 F.3d 914, 920-21 (5th Cir. 1995); Pfannstiel, 918 F.2d at 1187-88.

The defendants contend that the plaintiff's allegations of conspiracy under § 1983 must fail for two reasons. First, they charge that they are entitled to qualified immunity, and that therefore the conspiracy claims must fail. As this court has already found that the defendants are not entitled to summary judgment on their claims of qualified immunity, this contention requires no further discussion. The second assertion of the defendants in this matter rests upon the basic premise of conspiracy law that a single entity is incapable of conspiring with itself. As every defendant in this case acting in his official capacity is in essence the city itself, and in that the city cannot conspire with itself, the defendants charge that it is a legal impossibility for them to conspire together. As the defendants properly note, they are arguing that the "intracorporate conspiracy" doctrine should apply to the plaintiff's conspiracy claims under § 1983 and justify dismissal of the plaintiff's claims of conspiracy against the defendants in their official capacity.

The Fifth Circuit[4] has cautioned against the liberal expansion of the intercorporate conspiracy

[4] Five circuits have held that the intracorporate conspiracy doctrine applies in civil rights actions, and have primarily held the doctrine to apply in actions under 42 U.S.C. § 1985(3). Hartman v. Board of Trustees, 4 F.3d 465, 469-70 (7th Cir. 1993); Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505, 509 (6th Cir. 1991); Buschi v. Kirven, 775 F.2d 1240, 1252 (4th Cir. 1985); Cross v. General Motors Corp., 721 F.2d 1152, 1156 (8th Cir. 1983); Hermann v.

doctrine beyond the confines of its original boundary within the context of antitrust actions. Dussouy v. Gulf Coast Inv. Corp., 600 F.2d 594, 603 (5th Cir. 1981). However, despite its own warning, the Fifth Circuit has since determined that the doctrine is applicable in cases arising under 42 U.S.C. § 1985(3). Hilliard v. Ferguson, 30 F.3d 649, 653 (5th Cir. 1994) (finding that "a school board and its employees constitute a single legal entity which is incapable of conspiring with itself for purposes of § 1985(3)."). Other district courts within this circuit have likewise ruled. E.g., Roos, 837 F. Supp. at 806; Moody v. Jefferson Parish Sch. Bd., 803 F. Supp. 1158, 1166 (E.D. La. 1992); Hankins v. Dallas Indep. Sch. Dist., 698 F. Supp. 1323, 1330 (N.D. Tex. 1988). In light of the Hilliard decision and the other recent cases from within the Fifth Circuit, this court believes that it should also apply the doctrine in the civil rights context.

One question that initially arises is whether the doctrine should also be extended for use in cases of alleged conspiracy under 42 U.S.C. § 1983. Surprisingly, few other courts have broached the issue. It appears to this court that any proper discussion of the doctrine's potential expansion would include an analysis of the reasoning behind the Dussouny warning.[5] However, as the Fifth

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Moore, 576 F.2d 453, 459 (2d Cir. 1978). Four other circuits have limited its use, questioned its applicability, or refused to so extend the doctrine. Brever v. Rockwell Int'l Corp., 40 F.3d 1119, 1127 (10th Cir. 1994); Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984); United States v. Hartley, 678 F.2d 961, 970-72 (11th Cir. 1982); Novotny v. Great Am. Fed. Sav. & Loan, 584 F.2d 1235, 1256-59 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979). The Ninth Circuit has declined to take a position on the matter. Portman v. County of Santa Clara, 995 F.2d 898, 910 (9th Cir. 1993). As well, while the issue has been presented to the United States Supreme Court on at least two occasions, it has have refused to resolve the split among the circuits. Hull v. Shuck, 501 U.S. 1261, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991); Novotny, 442 U.S. at 372 n.11, 99 S.Ct. at 2349 n.11. The dispute over the proper application of the doctrine continues throughout the circuits today. See, e.g., Jennifer Martin Christofferson, *Obstacles to Civil Rights: The Intracorporate Conspiracy Doctrine Applied to 42 U.S.C. § 1985(3)*, 1995 Ill. L. Rev. 411.

[5] In Dussouy, one of the Fifth Circuit's concerns was that in a § 1985(3) action, as well as in a criminal conspiracy case, "the action by an incorporated collection of individuals creates the 'group danger' at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose." Dussouy, 600 F.2d at 603. Overall, courts have been lax in their analysis of why the doctrine should or should not apply. Christofferson, supra, note 3, at 426. This court shares many of the concerns expressed by Ms. Christofferson in her article, and feels that the Fifth Circuit should undertake a more detailed analysis justifying the application of this doctrine in the civil rights context. This doctrine was "designed to allow one corporation to take actions that two corporations could not agree to do, [and] should not be construed to permit the same corporation and its employees

Circuit chose not to do so when it expanded the use of the intracorporate conspiracy doctrine to include § 1985(3) claims in Hilliard, this court shall not belabor the point.

If the doctrine is to be extended to § 1985(3), it is only logical that it also encompass claims under § 1983. "Section 1983 is of the same Congressional vintage as section 1985. Furthermore, a section 1983 conspiracy claim would also have the same disruptive effect on business decisions as a section 1985 conspiracy action." Doe v. Board of Educ. of Hononegah Sch. Dist., 833 F. Supp. 1366, 1382 (N.D. Ill. 1993) (noting one purpose behind intracorporate conspiracy doctrine is to "preserve independent decision-making by persons or business entities, free of the pressures generated by the threat of conspiracy claims.").

The doctrine is commonly held to apply even though the individuals were motivated in part by personal bias or animus, but not when the individuals were motivated solely by personal bias. Dussouy, 600 F.2d at 603 ("When officers of a corporation act for their own personal purposes, they become independent actors, who can conspire with the corporation."); see, e.g., Hartman v. Board of Trustees of Community College Dist. No. 508, 4 F.3d 465, 470 (7th Cir. 1993); Buschi, 775 F.2d at 1252; Garza v. City of Omaha, 814 F.2d 553, 556 (8th Cir. 1987). As well, if the doctrine is to apply at all, it shall only apply to claims against the defendants in their official capacities and not to the claims against them individually. E.g., Harris v. Board of Ed. of Columbus, 798 F. Supp. 1331, (S.D. Ohio 1992); Snell v. Asbury, 792 F. Supp. 718, 720 (W.D. Okl. 1991). After all, these defendants only act "as the city" when acting in their official capacity, and the logic underlying the doctrine fails when applied to the individual capacity claims.

In any event, the undersigned cannot say as a matter of law that the defendants are entitled to the protection of the intracorporate conspiracy doctrine in the case at bar. There exist genuine issues of material fact as to whether the defendants fit within the main exception recognized within the doctrine, that is, whether their actions were motivated solely by personal bias. This is an issue for the trier of fact, and therefore this portion of the defendants' Motion for Summary Judgment shall

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to engage in civil rights violations." Brever, 40 F.3d at 1127.

be denied.

V. WAIVER OF CLAIMS

It has consistently been the contention of the defendants that the plaintiff has waived all of his claims for money damages against the defendants in their official capacities. They raise this matter again in this Motion for Summary Judgment, and in so doing, rely upon statements made by the plaintiff and his counsel both during the deposition of the plaintiff and before this court with regard to other proceedings in this case. Since the plaintiff's deposition, the City of Starkville was added as a named party to this action. The Final Pretrial Order has also been entered pursuant to local rules, and the order does not contain any such stipulation of waiver by the plaintiff. See Unif. Dist. Ct. R. 10(f)(3),(g) (stating that pretrial order shall contain "the stipulations and agreements of the parties;" pretrial order shall control subsequent course of action). Finally, even if these statements by the plaintiff and his counsel constitute a valid waiver enforceable at this stage of the proceedings, the defendants have failed to demonstrate how they would be prejudiced if this court allowed the plaintiff to retract any such "waiver" and pursue his claims as evidenced by the pleadings, submissions and the Final Pretrial Order. The undersigned previously denied summary judgment on this matter and declined to reconsider that same ruling. The defendants are not entitled to a judgment as a matter of law, and this portion of the defendants' Motion for Summary Judgment shall be denied.

VI. THE PLAINTIFF'S PUNITIVE DAMAGE CLAIMS

Finally, the court takes up the plaintiff's claims for punitive damages. Punitive damages are indeed recoverable under § 1983. Smith v. Wade, 461 U.S. 30, 56, 103 S.Ct. 1625, 1640, 75 L.Ed.2d 632 (1983); Hale v. Fish, 899 F.2d 390, 404 (5th Cir. 1990). However, the awarding of such damages is not available against a municipal defendant. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); Webster v. City of Houston, 735 F.2d 838, 860 n.52 (5th Cir. 1984). As such, the plaintiff's punitive damage claims against the City of Starkville and all of the other defendants in their official capacities should be dismissed. There is no genuine issue of material fact as to this matter and the defendants are entitled to a judgment as a

matter of law on these claims.

CONCLUSION

The defendants are entitled to the entry of a judgment as a matter of law on some of the plaintiff's claims, but there remain genuine issues of material fact as to others. Therefore, pursuant to this opinion and the order which shall follow, the defendants' Motion for Summary Judgment shall be granted in part and denied in part.

A separate order in accordance with this opinion shall issue this day.

THIS ___ day of February, 1996.

_____
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

H.B. MAXEY, Jr.
(a.k.a. "Bud" Maxey)

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ROBERT A. SMITH,
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ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED, ADJUDGED and DECREED:

1) The defendants' Motion for Summary Judgment is hereby GRANTED as to the plaintiff's § 1983 claims against the defendant Ben Hilbun, Jr., in his official capacity as City Attorney for the City of Starkville. All such claims against Hilbun are hereby DISMISSED.

2) The defendants' Motion for Summary Judgment is hereby GRANTED as to the plaintiff's claims of conspiracy under 42 U.S.C. § 1985(3). Those claims of the plaintiff are hereby DISMISSED.

3) The defendants' Motion for Summary Judgment is hereby GRANTED as to the plaintiff's claims for punitive damages under § 1983 against the City of Starkville as well as all of the individual defendants in their official capacities. All such claims of the plaintiff are hereby DISMISSED.

4) As to the remainder of the assertions presented by the defendants, the Motion for

Summary Judgment filed by the defendants in this cause is hereby DENIED.

All memoranda, depositions, affidavits and other matters considered by this court in granting in part and denying in part the defendants' Motion for Summary Judgment are hereby incorporated by reference and made a part of the record in this cause.

SO ORDERED this the ___ day of February, 1996.

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United States District Judge